No. 10964

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United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SIVEAR WILLARD LINDSTROM,
Appellant,

UNITED STATES OF AMERICA,
Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON SOUTHERN DIVISION

REPLY BRIEF OF APPELLANT

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THE TELEGRAM

In our opening brief we made the point that (1) there was no evidence to show that the telegram (Plaintiff's Exhibit 18) was ever received by the President; and (2) that there was no evidence to show that, even if such a telegram was received, it was sent by the appellant; and (3) that in any event the telegram was immaterial because it was sent previous to the notice of induction upon which this case is predicated.

By appropriate authority, which is not disputed in the brief of appellee, we showed that even testimony that the telegram was received would not justify its reception in evidence unless there was also proof that appellant sent it.

Pages 10 to 14 inclusive attempt to answer our argument upon this point. The argument seems to be based upon a misconception of our argument and a failure to correctly understand the cases cited by us, since the appellee cites no cases in addition to our authorities, except the case of *Lewis v. U. S.*, 38 F. (2d) 406, which we shall hereafter consider.

Replying to our quotation from *Drexel v. True*, 74 F. 12, it is said that the case is distinguishable because in that case there was no evidence that the telegram was received. We contend that here there was no evidence of receipt of this telegram, but in

any event the case is authority for the proposition that testimony of receipt of a letter or telegram is insufficient to justify their admission in evidence unless connected with the alleged sender.

Two and one-half pages of the brief of appellee are devoted to a discussion of the case of *Hartzell v. U. S.*, 72 F. (2d) 569, which is a decision of the Eight Circuit. All the case really establishes is that circumstantial evidence may be used to make documents prima facie admissible. The case does not hold that, where there is a direct denial by the defendant, this presumption is not overcome; and, furthermore, it appears from the portion of the opinion quoted on page 13 of the brief that there were many facts and circumstances in that case which were definitely proved and which confirmed authorship of the cablegrams. The evidence is not recited other than by the statement in the opinion to the effect that the cablegrams fitted into related parts of the scheme with other circumstantial evidence, "the competency of which is not challenged." Such is not the situation here. While appellant did admit that he sent a telegram to the President somewhere about this time, he specifically denied that this telegram contained the statement that appellant was not going to report for his preinduction physical or that he considered it a trick of the board. (Tr. p. 67.) The issue before the Court, therefore, is whether a telegram, which admittedly was sent, *contained this*

statement. There is in this case no circumstantial evidence that it contained this statement. The portion of the telegram which appellant denied does not fit into any scheme nor it is corroborated or sustained by any other facts or circumstances. In brief, the Hartzell case does nothing more than to reiterate the familiar rule that the sending of a letter or telegram may be proved by circumstantial evidence, a question not here involved.

It is stated in the brief of appellee that "this Court has applied much the same rule and reasoning in the case of *Lewis vs. U. S.*, 38 F. (2d) 406." It is difficult for us to understand this statement. The statement of the facts in the Lewis case overlooks one circumstance which makes the case of no authority here. Among other errors assigned in that case was the introduction in evidence of three letters claimed to have been written by the defendant. The first letter referred to on page 416 of the opinion was testified to as having been received by the witness in response to a letter written by him. In addition to this fact, the original letter was introduced and the signature compared with other letters containing the signature of the defendant, which were admitted. The quotation set forth on pages 13 and 14 of the brief of appellee related to this situation.

The brief overlooks the fact that the authorities, almost without exception, make a distinction between

reply letters and telegrams and a single letter or telegram. The rule is well settled that

> "A letter received in the due course of mail purporting to be written by a person in answer to another letter proved to have been sent to him, is prima facie genuine, and is admissible in evidence without proof of its authenticity, especially where the alleged writer admits that he received and replied to a letter of the character claimed to have been written to him." (32 C. J. (2d) p. 609.)

There is an excellent statement of this in *Lancaster v. Ames*, 68 Atl. (Me.) 533, where it is said:

> "It is true, as a general rule, that documentary evidence, to be admissible, must be authenticated, and in case of a letter this is ordinarily done by proof of the genuineness of the signature of the writer. When the signature is typewritten, this method of authentication may be difficult, if not impossible. At any rate, it was not tried in this case. But there is a relaxation of this rule in the case of what are called reply letters. The rule does not apply to a letter which is received by due course of mail, purporting to come in answer from the person to whom a prior letter has been duly addressed and mailed. Proof of these facts is sufficient evidence of the genuineness of the reply to go to the jury, without specific proof of the genuineness of the signature. The genuineness is assumed, at least, until the contrary is shown."

See also 20 Am. Jur., p. 196; 22 C. J. 94.

Here we have no such situation. This telegram was not in reply to any telegram sent by the President.

The rule that a reply letter or telegram is prima facie admissible, by proof of the sending of the original document, is an exception to the general rule which requires authentication of the documents. Since the facts here do not call for the application of the exception, the case, therefore, is not in point since it has to do with an entirely different situation to govern which an entirely different rule is applied.

The other two letters referred to on pages 416 and 417 of the decision likewise are not applicable here. The Court held that the letter of June 14, 1926, was not properly before the court because no sufficient objection was made to raise the question. The letter of March 27, 1926, was shown by evidence to have been dictated by the defendant, so of course this question did not arise.

Referring to the decision of this Court in *Ford v. U. S.*, 10 F. (2d) 339, the brief of appellee states that the facts there, which were held sufficient to support the admission of the document, were "not unlike the evidence in the instant case." We do not so understand the case. In that case the original teleram which was sent was typewritten. There was evidence that it was received at the office of the telegraph company and sent over the wire, and that the agent of the telegraph company took the name of the sender and his address and that the sender was registered at the address on that day. The significant portion of the opinion is that it is then stated

that the defendant offered further proof but "this proof did not deny the authenticity of the wire, but undertook to explain it as relating to something other than the conspiracy charge." Furthermore, there was evidence in the case that the defendant had called up a witness on that day and had told him that he was going to communicate with the person to whom the telegram was addressed. From all of this it was concluded by this court:

> "We think that the circumstances were sufficient to constitute a *prima facie* authentication of the wire, and that it was properly received."

These recitals of the facts show that there is no analogy between them. Here the defendant did deny the authenticity of the wire. Even if, under the Ford case, circumstances were shown sufficient to constitute a prima facie authentication of Plaintiff's Exhibit 18, this prima facie proof was overthrown by the positive denial of the defendant that the exhibit was the telegram which he sent. The Western Union office in Tacoma is about two blocks from the Federal Building. It would have been an easy matter to have subpoenaed in the records of the telegraph company and thus to have established the question of whether the exhibit had been sent by the defendant. This was not done. There are no facts or circumstances whatsoever to refute the positive testimony of appellant that the telegram which he sent did not contain these prejudicial statements.

THE EFFECT OF SECTION 661, TITLE 28, U. S. C. A.

Pages 14 to 19 and a portion of 20, inclusive, are devoted to the proposition that the telegram was admissible as an official document under Section 611. We have discussed this to some extent in our opening brief. We desire, however, to call attention to the fact that, even if the entire argument of appellee be accepted, this would go no further than to show that such a document as Plaintiff's Exhibit 18 was received by the President. *Ford v. U. S.* (supra) holds squarely that

> "There is no presumption that a telegram was sent by the party who purports to send it. Before it can be received in evidence, there must be some proof connecting it with its alleged author."

The fact, if it be a fact, that this telegram reposes in the files of the government would not make it admissible against the defendant in the absence of evidence that he composed it; and, therefore, even if we accept the argument of appellee that, in so far as receipt is concerned, proof of the authenticity of the document is not required, still there must be proof that the defendant sent it; otherwise designing persons could sign all kinds of forged or false names to letters or telegrams, send them to public officials, and then the persons whose names had been forged or used without authority could be indicted, tried and convicted upon, in effect, anonymous and hearsay acts of strangers.

We do not desire to be understood as admitting that the telegram, even as to receipt, was properly authenticated under Section 661. We cited authorities of both the federal and the state courts, which held that the statute does not apply to records not required by law to be kept by a particular officer. No authorities are cited to the contrary. There are cited certain Selective regulations. The first one is the regulation that each agency shall retain copies of correspondence received and correspondence sent. Obviously this telegram was neither correspondence received or sent. The telegram, if it was received, was received by the President, and the fact, if it be a fact, that it was sent by somebody to the state office, and then by the state office to the Puyallup draft board, would certainly not make the regulation applicable.

The second regulation, cited at the bottom of page 15, obviously refers to the records of the registrant as accumulated by the local draft board in dealing with the registrant. We find nothing in the regulation, therefore, that aids appellee, even if executive regulations be taken as constituting "authority of law."

We do not wish to concede, however, that the interpretation of the statute referred to in *U. S. v. Johnson*, 72 F. (2d) 614, and *Mohawk Milk Co. v. U. S.*, 48 F. (2d) 682, referred to in our opening brief, to the effect that Section 661 is restricted to

documents required to be kept by the officer, may be nullified by administrative regulations. It is unnecessary to determine that here, however, because there is no regulation which provides that the President's files shall be placed in the custody of local draft boards.

It is difficult for us to understand the long quotation from *Cohn v. U. S.*, 258 F. 355, set forth on pages 19 and 20 of the brief of appellee. That case held squarely that it was error to admit in evidence copies of letters on file in the Navy Department which were not properly authenticated under the seal of the Navy Department. The case is authority against the position of appellee. In a court-martial proceeding against a Navy yeoman, certain letters from the yeoman to the defendant were obtained from the defendant's files and put in evidence in a court-martial proceeding against the yeoman, and were thereafter transferred to the office of the Judge Advocate General of the Navy. Thereafter Cohn, a civilian, was tried for the same transaction, and the government offered in evidence copies of the letter made by a Navy inspector. The court held that this was error because the original letters were in the custody of the Navy and the only way to prove them was by proper authentication. So, in the case at bar, in order to prove receipt of the telegram by the President, this had to be done, if a copy was introduced, by authentication by the Chief Executive, or, if the

original was introduced, then by the oral testimony of persons in charge of the President's office.

However, we repeat again lest it be overlooked, that in the final analysis it is immaterial whether receipt of the telegram by the President was or was not shown. The controlling question is whether there was any proof introduced to show that appellant ever sent this telegram to the President. He specifically denies that he ever sent a telegram which contained the prejudicial matter which we have quoted. No evidence, either direct or circumstantial, was offered to contradict his testimony. The circumstances, at best, produced nothing but a presumption, which presumption was met by the specific proof.

The court will note that the brief of appellee does not controvert our contention that the telegram, if improperly admitted, was highly prejudicial. Neither does it make any reference to our argument that in any event the telegram was immaterial because it antedated the induction notice here involved. If this had been a case of fraud or conspiracy, it may be that evidence of this character, if properly proved, might have been admissible. Such was not this case, however. Appellant could not have had a wilful design to refuse to obey the induction order until the order had been issued. The alleged fact that he had previously resisted a previous order would not prove that his subsequent action in refusing to obey another order was wilful. We therefore insist that in any event the telegram was entirely immaterial.

ADVICE OF COUNSEL

The opening brief assigned as error the refusal of the trial court to permit appellant to show that, in so far as the charge of a continuing refusal to obey the order of induction was concerned, he acted upon advice of counsel. Since the brief was written, our attention has been directed to *Williamson v. U. S.*, 52 Law. Ed. 278, in which case the Court upon page 293 sets forth with approval an instruction concerning the effect of the advice of counsel where the charge involves the alleged wilful act of the defendant. It is there stated that

> "If a man honestly and in good faith seeks advice of a lawyer as to what he may lawfully do * * *, and fully and honestly lays all the facts before his counsel, and in good faith and honesty follows such advice, relying upon it and believing it to be correct, and only intends that his acts shall be lawful, he could not be convicted of a crime which involved wilful and unlawful intent; even if such advice were an inaccurate construction of the law."

While it may be admitted that the offered evidence was subsequent in time to the induction order, nevertheless, since the indictment charged a continuing wilful refusal to report up to the time of trial, then under the rule in the Williamson case, evidence that appellant was in good faith acting on advice of counsel, in the belief that his alleged deferment would be finally taken care of, was competent.

Respectfully submitted,

S. J. O'BRIEN,
Attorney for Appellant.